

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2002B057**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

BLAIR WILLIAMS,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS, COLORADO TERRITORIAL CORRECTIONAL FACILITY,

Respondent.

Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on February 5 and 26, 2002 at the Division of Administrative Hearings, 1120 Lincoln, Suite 1400, Denver, Colorado. Assistant Attorney General Joseph Haughain represented Respondent. Respondent's advisory witness was Juanita Novak, the appointing authority. Complainant appeared and was represented by Michael O'Malley.

MATTER APPEALED

Complainant, Blair Williams, ("Complainant" or "Williams") appeals his demotion from Correctional Security Services Officer II to Correctional Security Services Officer I by Respondent, Department of Corrections, Colorado Territorial Correctional Facility ("Respondent" or "DOC").

For the reasons set forth below, Respondent's action is **affirmed**.

VIDEO CONFERENCING

Respondent filed a motion to take testimony of Alan Simpson by videoconferencing, on grounds that Simpson is an inmate incarcerated at Buena Vista Correctional Facility and given the attendant costs, including the need to have two correctional officers accompany Simpson to the hearing in Denver, it was more cost effective to present his testimony via video conferencing. The motion was granted. The hearing was held at Room B75, 1525 Sherman Street, Denver, Colorado. Simpson was able to see each attorney while that attorney was conducting his examination. It also enabled the ALJ, the parties, and counsel in Denver to see Simpson. There were no technical difficulties associated with the video conferencing, and utilization of this resource proved to be very effective.

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ISSUES

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the range of alternatives available to the appointing authority;

FINDINGS OF FACT

General Background

1. Complainant was a sergeant, classified as a Correctional Security Services Officer II ("CSSO II") from August 1, 1998 to December 1, 2001 when he was demoted to Correctional Security Services Officer I ("CSSO I"). Complainant during all times relevant to this action was and is an employee of DOC, assigned to Colorado Territorial Correctional Facility ("CTCF").
2. Complainant has worked for DOC for ten years as of June 2002.
3. As a sergeant, Complainant was a supervisor within his work unit and was in charge of mentoring and training CSSO Is in the appropriate procedures and DOC regulations for various situations that arise within DOC's setting.
4. Captain Ron Brown was the shift commander for Complainant at all times relevant to this matter. Brown was regarded as a good officer by other employees at CTCF and was well liked by many of them.
5. Juanita Novak is the warden and appointing authority for CTCF. In managing CTCF, Novak reviews, on a daily basis, incident reports filed by CTCF officers. She uses the incident reports to keep informed about what is happening at CTCF and to make managerial decisions.

DOC Administrative Regulations on Use of Force

6. DOC trains its staff on the appropriate use of force and the DOC administrative regulations governing use of force, including AR 300-16RD, and DOC's Staff Code of Conduct, AR 1450-1.
7. Under AR 300-16RD(I)(A)(2), the use of force is justified when physical force "is necessary and reasonable, not excessive, and is appropriate when considering the type of resistance/non-compliance encountered."

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8. Under AR 300-16RD(C)(1), “[a]ll staff who have knowledge of or respond to any use of force, regardless of degree of force, must immediately report the use of force incident to their supervisor and complete a facility incident report before the end of the shift.”
9. Under AR 1450-1, (IV)(B), “[e]xcessive physical force or verbal abuse of offenders by staff will not be permitted, nor will physical/verbal force be used beyond that necessary to control an offender or to enforce legitimate and legal commands.”

Simpson Incident

10. On March 18, 2001, in Cellhouse 5 at CTCF, during the swing shift, Alan Simpson, an inmate, was causing a disturbance during the counting of the inmates.
11. Simpson was disobeying an order to get off the bars of his cell and submit to being handcuffed. Simpson was not being violent. Eventually Simpson complied with the orders and was handcuffed, behind his back.
12. Simpson was then escorted from his cell by at least three officers, including Complainant and two correctional officers, Mark Baldwin and Dave Smith. While Simpson was being escorted, Complainant said something to Simpson about being a “tough guy.”
13. Simpson was escorted to an unoccupied shift lieutenant’s office in Cellhouse 5. The office was a small room, approximately ten feet by ten feet, and contained a desk and chair to the right of the entrance and against the wall.
14. Sergeant Rudy Baca, a CSSO II who worked in security, entered the office soon after Simpson and the three escorting officers.
15. Upon arriving in the office, Simpson was seated in the chair against the wall. There were approximately three feet of distance between the chair and the desk.
16. Soon after Simpson, the escorting officers and Baca entered the office, Captain Brown, the shift commander on the swing shift, entered the office.
17. Brown, upon arriving in the office, sat down on the front corner of the desk, in front of Simpson and told Simpson to get the smirk off his face.
18. When Simpson did not comply, Brown moved forward, placing his hands on either side of Simpson’s face. When Brown placed his hands on Simpson’s head, Baca moved forward, low down, and placed his hands on Simpson’s right leg, which was close to Brown’s groin, to insure that Simpson did not kick Brown.
19. Brown, using his right hand, then hit Simpson on the left side of his face and began to squeeze Simpson’s head with his hands. When Simpson did not respond, Brown

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cupped his hands and hit Simpson a second time on his ear. Simpson began to squirm, trying to get away from Brown.

20. Brown then placed his thumb under Simpson's eye and told him that next time he would poke out Simpson's eye. At this point, Simpson said he had had enough and would behave.
21. During this incident, Simpson was in a chair to the right of the entrance to the office. Baldwin was standing by the entrance and to the left of Simpson. Baca was to the right of Simpson. Complainant was facing Simpson on Simpson's left. Smith was also to Simpson's left. Brown was in front of Simpson.
22. Brown was the highest-ranking officer in the room during this incident. Complainant and Baca were both sergeants. Baldwin and Smith were the lowest ranking officers present. Complainant was shift commander and had supervisory authority over both Baldwin and Smith. Brown supervised everyone present in the office.
23. After the incident, Brown told Baldwin and Baca that they did not need to prepare reports on the incident.
24. Complainant prepared an Incident Report, which he signed and dated March 18, 2001, stating:

"...inmate Adam Simpson . . . continued to yell and sing loudly after several warnings to be quiet during count time. As I stood in front of his cell and told him to be quiet during the formal count, he said that he did not care. He said that he wanted to go to Seg. I contacted Captain Brown, Shift Commander, concerning this count interference and facility disruption. Captain Brown arrived at CH-5 with additional Yard staff and counseled inmate Simpson. Inmate Simpson gave staff his word that he would discontinue the facility disruption and would not be a management problem. Inmate Simpson was returned to his assigned cell."
25. After the Simpson incident, towards the end of the shift, when Baldwin was turning in his equipment, Officer Root and Smith were present and Smith said to Root, "You don't rat out a captain or you are screwed." Baldwin believed the comment to be directed at him.
26. Officer Dave Johnson was carpooling with Baldwin at this time. Soon after the Simpson incident, Johnson was no longer able to carpool with Baldwin. Baldwin had difficulty finding anyone else with whom he could carpool.
27. After the Simpson incident, Baldwin was in the cafeteria and sat down at a table with

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four or five other officers. All of them immediately got up and left the table.

28. Baldwin has received a number of “hang-up” calls since the Simpson incident.
29. Baldwin and Baca have never discussed the Simpson incident with each other.
30. On March 18, 2001, Simpson described the incident in a letter to his girlfriend, telling her he had been “assaulted (sic) by a captian (sic). . . .they stopped in an office and then sat me down took off my glasses held me down and socked me in the ear because I was grinning. Yeah then he stock his finger in my eye and said if he had anymore problems with me he would poke it out next time. “ Simpson then cautioned his girlfriend not to write him back about it because it might “cause problems.”
31. Simpson, Baldwin and Baca’s testimony with regards to this incident are found to be credible on the basis that they consistently and independently corroborated each other’s statements with the regards to the incident on March 18, 2001. All three testified that they, along with Brown, Williams and Smith, were present at the incident. All three testified that Baca was restraining Simpson’s legs. All three testified that Brown held Simpson’s head between his hands. In addition, Baldwin and Simpson independently corroborated each other about specific key details – the “tough guy” comment by Williams, Simpson’s seated and handcuffed position during the assault, Brown striking Simpson twice and Brown’s statement that he would poke out Simpson’s eye.
32. Simpson’s testimony is also credible because of the contemporaneous letter to his girlfriend.
33. Baldwin’s testimony is credible despite his transfer request (discussed below at Findings of Fact Nos. 52 and 53) because there was no credible evidence that there was a quid pro quo for his testimony. In addition, his initial request for a transfer predates his coming forward about the March 18, 2001 incident. His subsequent requests, based upon a fear of retaliation, and made after he had disclosed both his presence and the salient facts regarding the Simpson incident, do not affect his credibility. Finally, Baldwin’s description of various details of the assault are more credible than those provided by Simpson and Baca because he was not being assaulted, as Simpson was, nor was he bent over below Simpson’s head and shoulders area, as Baca was.

Investigation of Simpson Incident

34. In July 2001, Baldwin reported the assault on Simpson because he had been wrestling with his conscience and because other officers were ostracizing him.
35. After Baldwin reported the assault on Simpson, the matter was referred to the Inspector General’s (“IG”) office for investigation. Criminal Investigator Charles Hatch from the Inspector General’s office was assigned to investigate the Simpson assault.

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Eventually he prepared a report on the investigation (the "IG Report").

36. During the IG investigation, Simpson was interviewed by the IG's Office. He stated that he had been assaulted by Brown and had not reported the assault because he was concerned about reprisals. He also informed the investigators that he had written about the incident in a letter to his girlfriend.
37. Hatch contacted Simpson's girlfriend and obtained a copy of the letter Simpson wrote her, describing the March 18, 2001 incident.
38. In addition to other witnesses, during the course of the IG's investigation, Complainant, Baldwin, Baca and Simpson were all interviewed by IG investigators.
39. Hatch interviewed Complainant at Complainant's home on his day off. Hatch asked Complainant a number of times what he remembered and each time Complainant said he didn't remember anything. Hatch mentioned the Code of Silence and Complainant said he still did not remember.
40. During the course of the IG investigation, Baldwin asked to be transferred because he was concerned he would be retaliated against for cooperating in the investigation. Novak did not intervene in any way in Baldwin's transfer to Youth Offender Services ("YOS").
41. During Simpson's interview with Hatch, Simpson recalled Williams being present at the incident and remembered Williams' name. Simpson asked for, but was not promised, nor did he receive, a letter of recommendation to be sent to the parole board in case he was retaliated against for cooperating in the IG's investigation.
42. Baca's recollection of the Simpson incident "improved" during the course of Hatch's investigation. Initially, Baca stated that Brown did not get close to Simpson. After he was pressed by Hatch, he recalled that Williams, Simpson and he were present at the incident. In addition, he recalled placing his hands on Simpson's leg and Brown holding Simpson's face. At no time has Baca recalled Brown hitting Simpson.
43. At no time was Baca promised a promotion for talking to investigators from the IG's office.
44. Baca's DOC peers, not his superiors, have retaliated against him since he spoke to Hatch, by not speaking to him.

R-6-10 and Disciplinary Action

45. On November 13, 2001, Warden Novak held an R-6-10 meeting with Complainant.
46. At the beginning of the R-6-10 meeting, Novak informed Complainant that DOC had statements from two staff members who were present at the March 18, 2001 incident

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and from the inmate who was assaulted. In addition, she told him, they had a letter the inmate had written to his girlfriend about the incident.

47. During the R-6-10 meeting, Novak and Complainant had the following exchange:

Novak: Do you recall of any time seeing Captain Brown use excessive force on an inmate?

Complainant: Yes, yes.

Novak: When was that?

Complainant: I couldn't give you dates, I don't remember, I mean a lot of it's just . . .

Novak: But do you remember what he did?

Complainant: A lot of pokin'; a lot of this kind of stuff. . .you know, "if I have to come back. . .we'll deal with this. . ."

Novak: Did you ever see him punch an inmate?

Complainant: No

Novak: Did you ever see him slap an inmate?

Complainant: Once

Novak: Did you report it?

Complainant: No, you don't do that.

Novak: Do you realize it's your duty? It's the law? You have a duty to report excessive use of force?

Complainant: I know that. But I'm being honest.

Novak: And that's what I expect from you.

Complainant: Okay.

Novak: I wouldn't expect anything else.

48. Even after being shown a picture of Simpson, Complainant, throughout the investigation, the R-6-10 meeting and even at the hearing, after videoconference testimony by Simpson, claims not to remember Simpson or any part of the March 18th incident.

49. Prior to imposing disciplinary action, Novak reviewed the IG Report and Simpson's letter to his girlfriend.

50. On November 30, 2001, Novak gave Complainant written notice that she was imposing a disciplinary action of demotion from CSSO II to CSSO I, effective December 1, 2001, a reduction of his pay from its current level to the maximum pay allowed for a CSSO I and ordered him to report to graveyard shift upon his return to CTCF. She further stated that he would be eligible to test for a promotion one year from the date of the disciplinary action.

51. As grounds for the disciplinary action, Novak found that Complainant had violated AR 300-16RD (Use of Force Options), in particular, Sections (I)(A)(2); (IV)(B)(4); and (IV)(C)(1), and AR 1450-1 (Staff Code of Conduct), in particular Sections (IV)(B);

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(IV)(N); (IV)(Y); (IV)(Z); (IV)(II) and (IV)(ZZ). In short, Novak found that Complainant failed to report the excessive use of force against Simpson and another incident of excessive use of force by Brown against an inmate and that Complainant falsely reported the March 18, 2001 incident.

Treatment of Other DOC Employees Present at Simpson Incident

52. Baldwin transferred to YOS in Pueblo after reporting the Simpson incident and interviewing with Hatch from the IG's office. Prior to the Simpson incident he had requested a transfer to YOS in Pueblo. He made a second transfer request, also to YOS in the Pueblo area, soon after the Simpson incident. He then made a third transfer request to the East Complex area just outside Canon City.
53. Baldwin made his first transfer request because he was interested in working for YOS. He made his second transfer request because of his continued interest in YOS and because he was uncomfortable with the peer pressure he experienced after the Simpson incident. He made his third request because the first request had been denied and he had not received a response to his second request. By requesting a transfer to the East Complex he had a broader range of transfer options.
54. Smith, throughout the investigation, stated that he did not recall anything about the Simpson incident. Smith was docked \$150 per month for three months.
55. In April or May of 2001, prior to Baldwin reporting the Simpson incident, Baca tested for a case manager position. He placed in the top ten of all applicants testing for the position.
56. After being interviewed by Hatch, in early fall, Baca interviewed as one of the top three candidates for a case manager position at Arkansas Correctional Facility. In November 2001, he again interviewed as one of the top three candidates for a case manager position with Fremont Correctional Facility. In January 2002, he interviewed for and accepted a case manager position at Four Mile Correctional Facility.
57. Brown was terminated from DOC as a result of an investigation into assaults on inmates.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 and generally includes:

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- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. *McPeck v. Colorado Department of Social Services*, 919 P.2d 942 (Colo. App. 1996).

Complainant has requested, as relief, reinstatement to the position of Correctional Security Services Officer II and back pay. Neither party requested attorney's fees.

II. HEARING ISSUES

A. Complainant committed the acts for which he was disciplined.

Complainant was disciplined for failing to report at least one incident of excessive use of force and falsely reporting the Simpson incident. In defense, Complainant argues that simply because he was present in the room, there is no evidence that he saw what happened. Complainant states that he does not recall the incident or even Simpson himself.

Whether or not Complainant remembers either Simpson or the incident is not pertinent to this particular issue. What is at issue is whether Complainant was present, wrote a false report and did not report an excessive use of force on an inmate.

Complainant was present during the March 18, 2001 incident. The undisputed testimony of at least two witnesses and Complainant's own Incident Report, written the same day as the incident, established this fact. The credible evidence establishes, and it has been found, that Simpson was handcuffed behind his back then escorted to a small empty office where he was seated in a chair, that Complainant was standing in front of Simpson and on Simpson's left side, that Simpson was hit twice on the left side of his face and that Brown put his right thumb under Simpson's eye and threatened him with the loss of an eye. Complainant's Incident Report, written the same day as the Simpson incident, sums up this entire sequence of events with the words "Captain Brown arrived at CH-5 with additional Yard staff and counseled inmate Simpson."

There was no credible evidence of anything that would have obstructed Complainant's view of Brown's hands as Brown struck Simpson or Complainant's view of Simpson's face when Brown placed his thumb under Simpson's eyes. Even if it is accepted that Complainant, standing in front of Simpson and on the same side on which Simpson was struck, did not see Brown hit Simpson or place his thumb under Simpson's eye, there is still the evidence of Brown's spoken threat. Complainant's own Incident Report states that Brown "counseled" Simpson and references Simpson's response, stating "Inmate Simpson gave staff his word that he would discontinue the facility disruption and would not be a management problem." Complainant heard the interaction between Brown and Simpson and described it in his Incident Report. It is the manner in which Complainant described the incident that is at issue.

Complainant's description of the incident is, at best, inaccurate. It describes a violent situation in mild terms. Given what transpired in the office, his description is deceptive in its blandness. Complainant reported this as a "counseling session." There is no indication anywhere in his Incident Report that any force was used, excessive or appropriate. Given that Incident Reports are used as a form of communication from mid-level managers to the warden, Complainant's report, at best, does not convey the true nature of what occurred. Given that it is the only written record of the event, such "inaccuracy" could cover up the event indefinitely. Complainant's and Smith's lack of memory of the event show how easily this can occur. But for Baldwin's conscience, this incident would have remained a "dirty secret."

Complainant was also disciplined for failing to report other incidents he had witnessed of excessive use of force by Brown, as required by AR 300-16RD, Section IV(C)(1). Respondent argues that Complainant himself stated at his R-6-10 meeting that he had witnessed Brown engage in such acts on other occasions. Complainant argues that Respondent failed to thoroughly investigate these alleged incidents.

A review of the transcript shows that Complainant stated that he had witnessed Brown use excessive force on an inmate, including poking and threats and he, Complainant, had not reported it because "you don't do that." While Novak asked Complainant when he had witnessed such incidents, she did not ask which inmates, she did not ask how often he had witnessed such events, the inmates' level of resistance or any of the circumstances surrounding those situations. Novak did not ask questions that would elicit specific details. Throughout the hearing, Respondent argued that it was specific details such as these, especially an inmate's level of resistance, that determine whether there was an excessive use of force. There is no indication of any type of investigation or additional fact gathering into the circumstances of these events, beyond Novak's questions during the R-6-10 meeting. There are not enough facts about the events for an appointing authority to determine that there actually was an excessive use of force and, therefore, a failure to report by Complainant.

What was established was that when Complainant sees such occurrences, he does not report it because "you don't do that." Complainant demonstrated a marked tendency on

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his part to ignore excessive use of force against inmates. However, without additional information, Complainant cannot be found to have committed the act of failing to report other instances of Brown using force.

Complainant committed one of the acts for which he was disciplined - falsely reporting the Simpson incident.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

An employee may be disciplined for willful misconduct or violation of department rules. Board Rule R-6-9, 4 CCR 801. Complainant violated DOC's Staff Code of Conduct and Use of Force administrative regulations by falsely reporting an event and by failing to report an excessive use of force at that event. Therefore, it was appropriate to discipline him under the Board's rules.

Arbitrary or capricious exercise of discretion can arise in only three ways, namely: (a) by neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) by failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; (c) by exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Van de Vegt v. Board of Com'rs of Larimer County*, 55 P.2d 703 (Colo. 1936) and *Lawley v. Dep't of Higher Educ.*, No. 00SC473, slip op. (Colo. December 3, 2001).

The IG's office did an extensive investigation of Baldwin's allegations regarding Brown. Based upon that investigation it was found that Complainant had been one of the parties present during the Simpson incident. Complainant was questioned and denied any knowledge of the event or of Simpson himself. All witnesses to the event were interviewed by the IG's office. Novak reviewed the report on that investigation and conducted an R-6-10 meeting with Complainant. She and the IG's office were stymied, somewhat, in their investigation by Complainant's lack of memory. In short, Respondent thoroughly investigated the Simpson incident.

Given the evidence before her, Novak exercised her discretion to discipline Complainant in a reasonable fashion. It is reasonable to discipline Complainant in light of his failure to report and his role as a supervisor. Disciplining him was neither arbitrary nor capricious. The employees who admitted knowledge of the incident and shared that knowledge with the IG investigators were not disciplined. Those that saw nothing, heard nothing and did nothing, even when confronted by the IG investigators and/or Novak did receive discipline. Complainant argues that Novak was arbitrary or capricious because, with the exception of Complainant, none of the employees present at the March 18th incident filed a written report. However, this argument ignores the difference in the various employees' circumstances.

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Baldwin was the DOC employee present at the incident who behaved with the most integrity. He was ostracized before he made his report, yet, after wrestling with his conscience; he independently stepped forward and volunteered information about the incident. He did this at a time when he was still assigned to work at CTCF, without any promise of a transfer to another facility. Novak did not discipline him because he was the only DOC employee to completely report all of the events on March 18, 2001. Complainant on the other hand, filed a false report and, at no time, either soon after preparing that report or during the investigation, has he come forward.

Baca and Complainant were both sergeants and both of them were questioned by the IG investigators. But, when pressed in their interviews, they responded in different fashions. Baca described as much of the events as he could have reasonably been expected to witness. He recalled both Simpson and Complainant's presence. Complainant denied any knowledge of the event or Simpson, an allegation which strains credulity given what occurred. In addition, Complainant filed a misleading incident report, a deceptive description of what actually occurred. Even if now he doesn't remember what happened, at the time of preparing the report he did.

Smith was a lower level officer than Complainant and, unlike Complainant, had no supervisory authority. Because of his ranking as a CSSO I it was not possible to demote him. Yet because of his refusal to cooperate in the investigation and his failure to report the event, he was disciplined with a pay reduction for three months.

Two factors were weighed with regards to each of the DOC employees present at the Simpson incident. Those factors were rank and role in the ensuing investigation. Given the difference in Complainant's circumstances from Baldwin and Baca, it was appropriate to discipline Complainant and, as compared to Smith, to discipline him more severely.

C. The discipline imposed was within the range of reasonable alternatives

Novak disciplined Complainant by demoting him from CSSO II to CSSO I. His pay was reduced to the maximum pay allowed for a CSSO I and he was assigned to the graveyard shift upon his return to CTCF. Novak further stated that Complainant would be eligible to test for a promotion one year from the date of the disciplinary action.

The range of other possible actions, short of demotion, available to Novak would have been a corrective action or suspension for a period of time without pay. Given Complainant's role as a supervisor, mentoring officers under him, and the seriousness of the event, a corrective action would not have been severe enough. In addition, a suspension would still have left Complainant in charge of other officers. Therefore, a demotion, with an opportunity to test for a promotion in a year, was within the range of reasonable alternatives and an appropriate response to Complainant's role in the Simpson event. The credible evidence demonstrates that Novak, in compliance with Board rules, pursued her decision thoughtfully and with due regard for the circumstances of the situation

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as well as Complainant's individual circumstances. Board Rule R-6-6, 4 CCR 801.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined.
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was within the range of reasonable alternatives.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

Dated this 6th day of May, 2002.

Kristin F. Rozansky
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203
303-894-2136

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11-inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

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CERTIFICATE OF SERVICE

This is to certify that on the _____ day of May, 2002, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Michael O'Malley
1444 Stuart Street
Denver, Colorado 80204

and in the interagency mail, to:

Joseph Haughain
Assistant Attorney General
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods